

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,

v.

FREDERIC A. YURISICH and VERA M.
YURISICH,
Defendants.

No. CR-06-058-FVS

ORDER

THIS MATTER comes before the Court based upon the defendants' motion to dismiss. Frederic A. Yurisich is represented by Kimberly A. Deater. Vera M. Yurisich is represented by Frank L. Cikutovich. The government is represented by K. Jill Bolton.

BACKGROUND

On September 24, 2001, Frederic Yurisich was injured and the vehicle that he was driving was damaged when it was struck by a vehicle that was driven by an employee of the United States Department of Agriculture. Later, Mr. Yurisich underwent shoulder surgery. He and his wife, Vera Yurisich, retained attorney John Brangwin to represent them. He filed a tort action against the United States and, in due course, propounded discovery requests. The United States was represented by Frank Wilson, an Assistant United States Attorney. He arranged for federal investigators to surreptitiously video Mr.

1 Yurisich while he performed a number of activities that required him
2 to use the surgically repaired shoulder. In addition, Mr. Wilson
3 noted the depositions of Mr. and Mrs. Yurisich for September 16, 2004.
4 Prior to their depositions, Mr. Wilson answered Mr. Brangwin's
5 discovery requests, but he did not disclose the surveillance videos.
6 Mrs. Yurisich was present at her husband's deposition. Mr. Wilson
7 questioned him about the range of activities he was capable of
8 performing. He allegedly testified in a manner inconsistent with the
9 actions recorded in the surveillance videos. Mr. Wilson also deposed
10 Mrs. Yurisich. She allegedly confirmed the veracity of her husband's
11 description of the activities that he was capable of performing. Less
12 than one week after the depositions, Mr. Wilson disclosed the videos
13 to Mr. Brangwin. The case settled during December of 2004. On June
14 6, 2006, the government filed an indictment charging the Yurisiches
15 with perjury. The indictment is signed by James A. McDevitt, the
16 United States Attorney for the Eastern District of Washington, and K.
17 Jill Bolton, an Assistant United States Attorney. The Yurisiches move
18 to dismiss on the ground the charges are vindictive.
19

20 **RULING**

21 "[S]o long as the prosecutor has probable cause to believe that
22 the accused committed an offense defined by statute, the decision
23 whether or not to prosecute, and what charge to file or bring before a
24 grand jury, generally rests entirely in his discretion."
25 *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54
26 L.Ed.2d 604 (1978) (hereinafter "*Hayes*"). A prosecutor's charging

1 decisions are cloaked with a "'presumption of regularity.'" *United*
2 *States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 1486, 134
3 L.Ed.2d 687 (1996) (quoting *United States v. Chemical Foundation,*
4 *Inc.*, 272 U.S. 1, 14, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926)). The
5 Supreme Court is disinclined to second-guess a prosecutor's charging
6 decisions. *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524,
7 1530, 84 L.Ed.2d 547 (1985) ("the decision to prosecute is
8 particularly ill-suited to judicial review"). This is especially true
9 when the disputed decision occurs before trial begins (a decision made
10 after a conviction has been reversed is a different matter). *United*
11 *States v. Goodwin*, 457 U.S. 368, 381-82, 102 S.Ct. 2485, 2492-93, 73
12 L.Ed.2d 74 (1982). Nevertheless, a prosecutor's charging decisions
13 are subject to constitutional constraints. *Armstrong*, 517 U.S. at
14 464, 116 S.Ct. at 1486. "To punish a person because he has done what
15 the law plainly allows him to do is a due process violation of the
16 most basic sort[.]" *Hayes*, 434 U.S. at 363, 98 S.Ct. at 668. "[T]he
17 mere filing of an indictment can support a charge of vindictive
18 prosecution." *United States v. Hooten*, 662 F.2d 628, 634 (9th
19 Cir.1981), *cert. denied*, 455 U.S. 1004, 102 S.Ct. 1640, 71 L.Ed.2d 873
20 (1982). If a defendant presents direct evidence of vindictiveness,
21 the prosecutor must demonstrate that the disputed charging decision
22 was based upon non-vindictive considerations. *See United States v.*
23 *Jarrett*, 447 F.3d 520, 525 (7th Cir.2006) (citations omitted). The
24 Yurisiches have not presented direct evidence of vindictiveness.
25 Rather, they argue that an appearance of vindictiveness exists; that
26

1 is to say, the Court should presume the existence of vindictiveness
2 based upon circumstantial evidence. However, courts have been
3 reluctant to presume vindictiveness based upon events occurring prior
4 to trial. *See, e.g., Jarrett*, 447 F.3d at 525 ("Although there are
5 limited circumstances in which a defendant is entitled to a
6 burden-shifting presumption of vindictiveness, cases where courts have
7 found such circumstances have arisen exclusively in the post-trial
8 context."). In the Ninth Circuit, "the appearance of vindictiveness
9 results only where, as a practical matter, there is a realistic or
10 reasonable likelihood of prosecutorial conduct that would not have
11 occurred but for hostility or a punitive animus towards the defendant
12 because he has exercised his specific legal rights." *United States v.*
13 *Gallegos-Curiel*, 681 F.2d 1164, 1169 (9th Cir.1982). If the
14 Yurisiches make a prima facie showing, the burden shifts to the
15 government to present evidence that dispels the appearance of
16 vindictiveness. *Id.* at 1168.

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18 The Yurisiches argue that Mr. Wilson violated the Federal Rules
19 of Civil Procedure by refusing to disclose the videos prior to their
20 depositions. They insist they suffered prejudice as a result. Since
21 Mr. Wilson knew the content of the videos, but they did not, he was
22 able to ask questions whose significance they did not appreciate. In
23 their opinion, Mr. Wilson's behavior reflects animus toward them.
24 Moreover, as the record now stands, they do not know whether he played
25 a role in the decision to seek their indictment. They argue that,
26 since perjury charges are rare, he must have had some influence on the

1 ultimate decision. They urge the Court to order the government to
2 disclose the role, if any, played by Mr. Wilson in the decision-making
3 process and to establish a non-vindictive basis for seeking the
4 indictment.

5 As noted above, there is no direct evidence of vindictiveness on
6 the part of Mr. Wilson, Mr. McDevitt, or Ms. Bolton. Instead, the
7 issue is whether there is circumstantial evidence of vindictiveness.
8 The Yurisiches argue that vindictiveness may be presumed from Mr.
9 Wilson's behavior. Consequently, the Yurisiches must demonstrate at
10 least two things. The first is that it is reasonable to think that
11 Mr. Wilson acted as he did out of "hostility or punitive animus."
12 *Gallegos-Curiel*, 681 F.2d at 1169. The second is that a causal
13 connection exists between Mr. Wilson's alleged attitude and his
14 colleagues' decision to seek perjury charges.¹

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16 Courts have yet to reach consensus upon whether and, if so, the
17 point at which surveillance videos must be disclosed. *See, e.g.,*
18 *Brannan v. Great Lakes Dredge & Dock Co.*, 96 Civ. 4142, 1998 WL
19 229521, at *1-*2, 1998 U.S. Dist. LEXIS 6383, *3 (S.D.N.Y. May 7,
20 1998); *Smith v. Diamond Offshore Drilling, Inc.*, 168 F.R.D. 582, 586-

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22 ¹In *Hartman v. Moore*, 547 U.S. ----, ----, 126 S.Ct. 1695,
23 1700, 164 L.Ed.2d 441 (2006), the plaintiff alleged that federal
24 investigators induced an Assistant United States Attorney to seek
25 criminal charges against him because he criticized the Postal
26 Service. One of the issues was causation. "Some sort of
allegation," said the Supreme Court, "is needed both to bridge
the gap between the nonprosecuting government agent's motive and
the prosecutor's action, and to address the presumption of
prosecutorial regularity."

1 87 (S.D.Tex.1996); *Ward v. CSX Transp., Inc.*, 161 F.R.D. 38, 39-41
2 (E.D.N.C.1995). Even if Mr. Wilson should have sought a protective
3 order rather than unilaterally withholding the videos until after the
4 Yurisiches' depositions, the dispute over the videos' disclosure must
5 be viewed against the record as a whole. The United States admitted
6 liability for the collision. The parties negotiated in good faith and
7 reached an amicable settlement. The United States paid \$45,000 to Mr.
8 Yurisich. According to Mr. Brangwin's testimony, this sum fairly
9 compensated Mr. Yurisich for the damages he sustained as a result of
10 the collision. Mr. Brangwin is firmly convinced that the videos had
11 limited evidentiary value and little or no impact upon the resolution
12 of Mr. Yurisich's personal injury claim. Given these undisputed
13 circumstances, it is unrealistic to think that the claim or the
14 settlement provoked hostility or punitive animus on the part of Mr.
15 Wilson. The most that can be said is that he aggressively defended
16 his client, but aggressive lawyering is not the same as hostility or
17 punitive animus. Since nothing Mr. Wilson said or did creates an
18 appearance of vindictiveness, there is no need to determine whether
19 there is a causal connection between his conduct and his colleagues'
20 decision to seek the Yurisiches' indictment for perjury. The
21 Yurisiches' motion to dismiss will be denied.²

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24 ²Some of the issues raised by the Yurisiches' motion might
25 have been avoided had this case been referred to a prosecutor
26 outside the Eastern District of Washington for a decision with
respect to whether to seek an indictment. However, the United
States Attorney was under no obligation to proceed in this
manner.

1 **IT IS HEREBY ORDERED:**

2 The defendants' motion to dismiss (**Ct. Rec. 34**) is denied.

3 **IT IS SO ORDERED.** The District Court Executive is hereby
4 directed to enter this order and furnish copies to counsel.

5 **DATED** this 13th day of November, 2006.

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7 s/ Fred Van Sickle
8 Fred Van Sickle
9 United States District Judge
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